JD(ATL)–32–14
Miami, FL

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

UPS SUPPLY CHAIN SOLUTIONS, INC.

and **Case 12-CA-113671**

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL UNION NO. 769

Marinelly Maldonado and *John F. King, Esqs.,*
for the General Counsel.
Jonathan L. Sulds and *Angela Ramon, Esqs.*
(Greenberg Taurig, LLP), for the Respondent.
Noah Scott Warman and *Michael Gilman, Esqs.*
(Sugarman & Susskind, PA), for the Charging Party.

DECISION

Statement of the Case

IRA SANDRON, Administrative Law Judge. This case is before me on a January 31, 2014 complaint and notice of hearing (the complaint) stemming from unfair labor practice charges that International Brotherhood of Teamsters, Local Union No. 769 (the Union) filed against UPS Supply Chains Solutions, Inc. (the Respondent or SCS) relating to the bargaining unit at its Miami, Florida facility (the facility).

I conducted a trial in Miami, Florida, on September 12 and October 14, 2014, at which I afforded the parties full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence.

Issues

(1) Following the Union's certification on April 29, 2013, as the representative of employees at the facility, did the Respondent in August 2013 announce to those employees changes to their health insurance benefits, effective on January 1, 2014, without affording the Union prior notice and an opportunity to bargain; more specifically (a) no longer offering health insurance benefits to employed

spouses with alternative health insurance coverage, and (b) charging smokers an additional premium.

(2) Did the Respondent implement those changes on January 1, 2014, without affording the Union notice and an opportunity to bargain?

Witnesses

The General Counsel's witnesses were Juan Nunez, a unit employee and member of the Union's negotiating committee; and Eduard Valero, the Union's business agent.

The Respondent called B. J. Dorfman, a UPS manager; Jenny Schaffer, an in-house attorney for UPS; and Erik Rodriguez, an outside counsel for UPS.

Credibility resolution is not an important factor in this case since there is little disagreement about the underlying facts. Any differences in accounts of what took place during negotiations are not determinative.

Facts

Based on the entire record, including testimony and my observations of witness demeanor, documents, and stipulations, and the thoughtful posttrial briefs that the General Counsel and the Respondent filed, I find the following.

At all times material, the Respondent, a subsidiary of UPS, has been a Delaware corporation with its principal office and place of business in Atlanta, Georgia, and with places of business located throughout the United States, including the facility, where it is engaged in the business of providing transportation and freight services. The Respondent has admitted jurisdiction as alleged in the complaint, and I so find.

On April 29, 2013,[1] the Union was certified as the collective-bargaining representative of the following facility employees:

All regular full-time and part-time warehouse operations employees employed in the following job classifications: warehouse II and III; senior warehouse; inventory control representatives; inventory control associates II; customer support representatives I; customer support representatives II; order processing representatives II and III; customer care representatives III; and administrative assistant II . . . ; excluding all other employees including guards and supervisors as defined in the Act.

SCS has approximately 10,000 employees, of whom about 40 are in the unit.

[1] All dates hereinafter occurred in 2013, unless otherwise indicated.

The Respondent's Past Practice Prior to the Union's Certification

UPS provides a flexible benefits program to about 75,000 nonunion employees nationwide, including SCS. Each year, with the assistance of expert consultants, UPS reviews its benefits program in the context of health care benefits offered in the industry.

By law, the Respondent sends out to employees an announcement of changes in health care benefits, called summary of material modifications (SMMs). SMMs have been issued in September or October when changes will be implemented the following January 1.[2] In the event of major changes, SCS issues a summary plan description (SPD), describing the upcoming benefits in full detail. This was done in 2009.

Changes for 2014

In 2013, with the goal of keeping its costs and employees' contributions flat, UPS decided on two changes in the flexible benefits program, as described below. The General Counsel does not dispute the bases on which UPS made these determinations, and I have no reason to doubt that the Respondent acted in good faith.

On August 5, UPS distributed to employees in the flexible benefits program nationwide, including those in the unit, a planning guide for annual enrollment from October 14–November 1.[3] It announced the following changes:

- Tobacco premium increase—During annual enrollment you will be asked to certify whether you or your spouse use tobacco. If either of you does [sic], you'll pay a premium increase of $150 per month ($1,800 per year) [unless a smoking cessation program was completed before the end of 2013]. . . .

- Working spouse eligibility—Spouses who work and have access to medical coverage through their employer will not be eligible for medical coverage (which includes drugs and behavioral health) under the Flexible Benefits Plan. . . .

Management held six meetings with groups of unit employees at the facility, on August 26 and 28–30, in which the changes were described in English or Spanish.[4] Human Resources Supervisor Belkis Cruz conducted the meeting at which Nunez attended. Belkis told employees that they would have to go into the computer to remove spouses who would no longer be eligible and to certify that they and their spouses did not smoke.

After Nunez got off from work that day, he called Valero and informed him of the announced changes. Valero subsequently confirmed this with other employees. The Respondent concedes that it had not earlier specifically notified the Union of those changes.[5]

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2 See R. Exhs. 4–6, 8, 10–12, and 25; GC Exh. 13, for changes implemented on January 1, 2005, through January 1, 2013.

3 GC Exh. 6. See also GC Exh. 7, a news bulletin issued on about the same date.

4 See GC Exhs. 3–5.

5 See Tr. 88, representation of the Respondent's counsel.

Negotiations on a First Collective-Bargaining Agreement

Negotiations began in May, and the parties have held bargaining sessions about two or three times monthly since then. To date, they have reached no agreement.

At all times, Valero has been the chief union spokesperson, Nunez a member of the Union's bargaining committee, and Attorney Rodriguez, the Respondent's chief spokesperson.

By letter dated May 3 to the Respondent, Valero requested information, including a copy of unit employees' health and welfare benefits, for the purpose of collective bargaining. At the May 10 bargaining session, the Respondent provided him that information, including flexible benefits, in a loose-leaf binder.[6] These showed past announced and implemented changes in health insurance benefits, including those made at the beginning of a new calendar year.

On July 27 (Rodriguez at Tr. 191), the parties agreed to bargain over noneconomic items first and then turn to economics after that.

At the September 21 bargaining session, Valero stated that it had been brought to his attention that SCS had held meetings with employees concerning the two changes in health insurance benefits. He said that he had never been notified.

Rodriguez did not rebut Valero's testimony that, after Valero raised the subject, management asked to caucus and then came back with the response that the Respondent was not obligated to bargain. This logically would have followed a request by the Union to discuss or negotiate over the changes, and I therefore credit Valero's testimony that he did so.

Rodriguez' account of what he said was more detailed than Valero's, and I credit Rodriguez' testimony as follows. Rodriguez explained that the Respondent did not have to bargain over the changes because it had a long history of making modifications to the plan, almost every year; therefore, the upcoming changes represented a continuation of the status quo.

The changes were implemented on January 1, 2014.[7] No previous bargaining over the changes ever took place; indeed, the parties had no bargaining on the subject of health insurance benefits before then.

Analysis and Conclusions

Health insurance benefits are a mandatory term of employment. *Caterpillar., Inc.*, 355 NLRB 521, 522 (2010) (changes in drug prescription program); C*oastal Derby Refining Co.*, 312 NLRB 495, 497 (1993) (coverage for working spouses); *Trojan Mining & Processing*, *Inc.*, 309 NLRB 770, 771 (1992).

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[6] R. Exh. 3. This included, inter alia, the 2009 SPD and SMMs for changes effective January 1, 2011, 2012, and 2013.

[7] See GC Exh. 9, SMM issued in October.

As Judge David Goldman stated in *Latino Express, Inc.*, 360 NLRB No. 112, slip op. 12 (2014), "Board precedent has long been settled that, as a general rule, an employer with an obligation to collectively bargain may not make unilateral changes in mandatory subjects of bargaining without first bargaining to a valid impasse," citing *NLRB v. Katz*, 369 U.S. 736 (1962). The Respondent does not allege impasse. Two other bases on which an employer may lawfully make unilateral changes are that the union engaged in delay tactics or that the employer had economic exigencies that compelled prompt action. See *Pleasantview Nursing Home,* 335 NLRB 961, 962 (2001), revd. in part on other grounds 351 F.3d 747 (6th Cir. 2003); *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), enfd. 15 F.3d 1087 (9th Cir. 1994). The Respondent has averred neither.

Rather, the Respondent contends that it was not obligated to bargain over its announced and implemented changes in spousal coverage and smokers' premium because it has had the past practice of announcing changes in health care benefits for the following year and then implementing them on January 1. Thus, the Respondent argues, it was merely maintaining the status quo. The Respondent relies on *Courier-Journal (I)*, 342 NLRB 1093 (2004), in support of its position. Such reliance is misplaced.

In *Courier-Journal*, the employer had regularly made unilateral changes in the cost and benefits of the employees' health program, both under the contracts and during hiatus between contracts. The Board stated, "The significant aspect of this case is that the Union acquiesced in a past practice under which premiums and benefits for unit employees were tied to those of non-unit employees." Id. at 1094. The Board distinguished this from a situation in which a current union is not bound by its predecessor union's acquiescence to past practice, citing *Eugene Iovine, Inc.*, 328 NLRB 294, 294 (1999), enfd. 1 Fed. Appx. 8 (2d Cir. 2001). Ibid. Here, the Union was not certified until April 2013; ipso factor, it could not have acquiesced in any changes in health benefits before that time.

Contrary to the Respondent's position, as the Board stated in *MacKie Automotive Systems*, 336 NLRB 347, 349 (2001):

> It is well settled that an employer's past practices prior to the certification of a union as the exclusive collective-bargaining representative of the employees do not relieve the employer of the obligation to bargain about the subsequent implementation of past practices that entail changes in wages, hours, and other terms and condition of employment of unit employees.

See also *General Die Casters*, *Inc.*, 359 NLRB No. 7, slip op. at 25 (2012); Ros*e Fence, Inc.*, 359 NLRB No. 6, slip op. at 9 (2012); *Essex Valley Visiting Nurses Assn.*, 343 NLRB 817, 842–843 (2004), enfd. 455 Fed. Appx. 5 (D.C. Cir. 2012).

The Respondent also asserts that it provided the Union with notice of the changes when, in May, it furnished the Union with information showing previous annual changes in health insurance benefits. However, I cannot conclude that this somehow constituted notice within the meaning of Section 8(a)(5)—the Union had no way to know what, if any, changes the Company

contemplated but did not articulate; and the Union could hardly have been expected to negotiate in a vacuum when it had no idea what, if any, the specific changes would be.

The Respondent further argues that the Union, by agreeing on July 27 to bargain about economic items only after noneconomic items were settled, "adopted all of the Flex Plan including the established past practice of its annual changes, knowing that changes were imminent." (R. Br. at 48). In essence, this is another way of stating that the Union waived the right to bargain over health insurance benefit changes effective January 1, 2014. This argument fails because waiver of a right to bargain based on conduct must be clear and unmistakable. *Alison Corp.*, 330 NLRB 1363, 1365 (2000) ("[I]t must be shown that the matter claimed to have been waived was fully discussed by the parties and that the party alleged to have waived its rights consciously yielded its interest in the matter"); *Lear Siegler, Inc.*, 293 NLRB 446, 447 (1989). This did not occur here. On the contrary, after the Union learned from employees of the upcoming changes, the Respondent flat-out refused the Union's request to discuss or bargain over them.

I therefore conclude that the Respondent violated Section 8(a)(5) and (1) by implementing the changes in health insurance benefits on January 1, 2014, without affording the Union prior notice and an opportunity to bargain.

I further conclude that the Respondent's announcement of such changes to employees in August, without affording the Union prior notice and an opportunity to bargain, also violated Section 8(a)(5) and (1). See *Caterpillar, Inc.*, 355 NLRB at 524; *Brannan Sand & Gravel Co.*, 314 NLRB 282 (1994).

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By announcing and implementing changes in health insurance benefits without affording the Union prior notice and an opportunity to bargain, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(5) and (1) of the Act.

REMEDY

Because I have found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Since the Respondent unilaterally implemented new health insurance benefits, the Respondent shall be ordered to make any unit employees whole for any loss of benefits and any additional expenses that they may have suffered as a result. The make-whole remedy shall be

computed in accordance with *Ogle Protection Service,* 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), plus interest computed as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), enf. denied on other grounds sub nom. *Jackson Hospital Corp. v. NLRB,* 647 F.3d 1137 (D.C. Cir. 2011).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

The Respondent, UPS Supply Chain Solutions, Inc., Miami, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Announcing or implementing any changes in health insurance benefits or other mandatory subjects of bargaining without affording International Brotherhood of Teamsters, Local Union No. 769 (the Union) prior notice and an opportunity to bargain**.**

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request by the Union, restore the health insurance benefits that existed prior to the unilateral changes that were implemented on January 1, 2014, and maintain those terms until the Union agrees to the changes, the parties bargain to a collective-bargaining agreement, or they reach an overall valid impasse.

(b) Make employees whole by reimbursing them, in the manner set forth in the remedy section of the decision, for any loss of benefits and any additional expenses they incurred as a result of the unilateral changes in health insurance benefits that were implemented on January 1, 2014.

(c) Within 14 days after service by the Region, post at its facility in Miami, Florida, copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet set, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 26, 2013.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. November 28, 2014

Ira Sandron
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT announce or implement changes to your health insurance or other benefits without affording International Brotherhood of Teamsters, Local Union No. 769 (the Union) prior notice and an opportunity to bargain**.**

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights under Section 7 of the Act, as set forth at the top of this notice.

WE WILL, on the Union's request, restore the health insurance benefits that existed prior to the unilateral changes that were implemented on January 1, 2014, and maintain those terms until the Union agrees to the changes, we and the Union bargain to a collective-bargaining agreement, or we and the Union reach an overall valid impasse in bargaining.

WE WILL make employees whole by reimbursing them for any loss of benefits and additional expenses they incurred as a result of the unilateral changes in health insurance benefits that were implemented on January 1, 2014.

UPS SUPPLY CHAIN SOLUTIONS, INC.
(Employer)

Dated: _____ **By:** _____
(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

South Trust Plaza, 201 East Kennedy Boulevard, Ste 530, Tampa, FL 33602-5824
(813) 228-2641, Hours: 8 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/12-CA-113671 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (813) 228-2455.